



THE FEDERAL ELECTION COMMISSION  
Washington, DC 20002

1 **MEMORANDUM**

2 **TO:** The Commission

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4 **FROM:** Lisa J. Stevenson  
5 Acting General Counsel

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7 **BY:** Kathleen M. Guith *KMG*  
8 Associate General Counsel for Enforcement

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10 Mark Allen  
11 Assistant General Counsel *MA*

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13 Christine C. Gallagher  
14 Attorney *CG*

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16 **SUBJECT:** MUR 6798 (David Vitter for U.S. Senate, et al.)  
17 Supplemental Memorandum Regarding Response to Additional Notification  
18 Letters  
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21 **I. INTRODUCTION**

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23 This memorandum addresses arguments presented by Respondents in their response to  
24 additional notifications informing them of information that the Commission may consider in this  
25 matter that was not included in the MUR 6789 Complaint, but was contained in the disclosure  
26 reports filed by David Vitter for U.S. Senate and William Vanderbrook in his official capacity as  
27 treasurer (the "Vitter Committee") and The Fund for Louisiana's Future and Charles R. Spies in  
28 his official capacity as treasurer ("The Fund"). As discussed in detail below, Respondents'  
29 arguments do not affect the recommendations in the First General Counsel's Report ("FGCR")  
30 currently pending before the Commission.

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32 **II. BACKGROUND**

33  
34 The pending FGCR recommends that the Commission find reason to believe that David  
35 Vitter, his principal campaign committee, the Vitter Committee, and The Fund violated  
36 52 U.S.C. § 30125(e), a provision of the Federal Election Campaign Act of 1971, as amended  
37 (the "Act").<sup>1</sup> The recommendation was based on information indicating that: (1) Vitter may  
38 have "established, financed, maintained or controlled" The Fund, thus precluding The Fund,

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<sup>1</sup> First Gen. Counsel's Rpt. at 1-2 (Sept. 7, 2017).

1 which is registered as an independent expenditure-only political committee ("IEOPC"), from  
2 permissibly raising and spending non-federal funds, and (2) Vitter may have solicited non-  
3 federal funds for The Fund when his name and photo appeared on at least one Fund solicitation.<sup>2</sup>  
4

5 The FGCR was discussed at the Executive Session held on December 5, 2017, and the  
6 Commission directed OGC to send a letter to Respondents notifying them that information  
7 contained in the disclosure reports filed by Vitter and The Fund was reviewed by the  
8 Commission in the normal course of exercising its supervisory responsibilities and that the  
9 Commission may choose to include the information in its consideration of this matter.<sup>3</sup>  
10

11 By letters to Respondents' counsel dated December 14, 2017, OGC noted that disclosure  
12 reports filed with the Commission show that the Vitter Committee provided funds in the  
13 aggregate amount of \$950,000 to The Fund from February 2014 to July 2015, and notified  
14 counsel that these funds constituted a substantial percentage of The Fund's receipts and that this  
15 information suggests that Vitter may have "established, financed, maintained, or controlled" The  
16 Fund by providing funds in a significant or ongoing basis.<sup>4</sup> The letter also notified Respondents  
17 that if the Vitter Committee "financed" The Fund within the meaning of 52 U.S.C.  
18 § 30125(e)(1), then the Fund could not permissibly raise or spend non-federal funds, and  
19 Respondents could be deemed to have violated 52 U.S.C. § 30125(e) by soliciting, raising and  
20 spending non-federal funds.<sup>5</sup>  
21

22 Counsel for Respondents, The Fund, Guastella, and Lisa Spies, filed a response to the  
23 notification letter.<sup>6</sup> The remaining Respondents, Vitter and the Vitter Committee, did not file a  
24 response.<sup>7</sup>

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<sup>2</sup> *Id.* The FGCR further recommends that the Commission take no action at this time as to fundraisers Courtney Guastella and Lisa Spies because the record is unclear as to whether they impermissibly solicited non-federal funds while serving as agents of Vitter.

<sup>3</sup> See MUR 6798 Certification (Dec. 6, 2017).

<sup>4</sup> Letters from Kathleen M. Guith, Assoc. Gen. Counsel, FEC, to Charles R. Spies, Esq., Counsel, The Fund, and to Megan Sowards Newton, Esq., Counsel, Vitter Committee and Vitter (Dec. 14, 2017).

<sup>5</sup> *Id.*

<sup>6</sup> See The Fund Supplemental Response (Jan. 10, 2018) ("Supp. Resp.").

<sup>7</sup> By e-mails dated December 20 and 21, 2017, counsel for Vitter and the Vitter Committee notified OGC that their firm no longer represented those Respondents. E-mails from Megan Soward Newton, Esq. to Christine C. Gallagher, Attorney, FEC (Dec. 20, 2017, 10:39 AM EST; Dec. 21, 2017, 8:47 AM EST). Thereafter, on December 21 and 22, 2017, we forwarded the December 14, 2017, notification letter directly to Vitter and the Vitter Committee via e-mail and first class mail. E-mail from Christine C. Gallagher, Attorney, FEC, to William Vanderbrook, Treasurer, David Vitter for U.S. Senate Committee (Dec. 21, 2017, 9:17 AM EST).

1 **III. ANALYSIS**

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3 The Fund's Supplemental Response requests that the Commission ignore the funding  
4 information contained in the disclosure reports filed with the Commission and dismiss the matter  
5 based on the information in the Complaint and The Fund's original Response to the Complaint.  
6 In support of its position, The Fund asserts that the Vitter Committee's contributions did not  
7 constitute a substantial portion of The Fund's receipts, that OGC's use of the funding  
8 information is contrary to the Act and Commission's regulations because the funding  
9 information became available subsequent to the filing of the Complaint and Response; and that  
10 the application of the "established, financed, maintained, or controlled" analysis in 52 U.S.C.  
11 § 30125(e) to restrict contributions to an IEOPC is unconstitutional, because it runs contrary to  
12 *Citizens United v. FEC* and other court precedent. We address each of Respondents' arguments  
13 below.

14 **A. The Vitter Committee Financed The Fund Because it Provided a Significant**  
15 **Amount of Contributions to The Fund and Provided Contributions on an Ongoing**  
16 **Basis**  
17

18 During the 2014 and 2016 election cycles, The Fund raised approximately \$7.4 million;  
19 the Vitter Committee's \$950,000 in contributions to The Fund constituted approximately 12% of  
20 that amount.<sup>8</sup> Respondents argue that these contributions are not a significant amount of The  
21 Fund's receipts and thus The Fund was not "financed" by The Vitter Committee.<sup>9</sup> Respondents'  
22 argument, however, is not supported by the facts. The key factor in the analysis, as explained in  
23 the FGCR, is whether the Vitter Committee provided funds in a "significant amount or ongoing  
24 basis" to The Fund.<sup>10</sup> Here, the Vitter Committee did both, providing The Fund with a  
25 significant amount (\$950,000) and on an ongoing basis (over approximately a year and a half).  
26 The amount of the contributions made the Vitter Committee The Fund's single largest  
27 contributor. In 2014, the year during which the Vitter Committee made the bulk of its  
28 contributions, its contributions constituted 37% of the funds raised that year.<sup>11</sup> Therefore,  
29 relative to the funds raised by any other single source, the contributions from the Vitter  
30 Committee represent a "substantial percentage of the organization's receipts."<sup>12</sup> And further  
31 examination of The Fund's overall receipts at the time of each of the Vitter Committee's  
32 individual contributions shows that the Vitter Committee had contributed 23% of the Fund's  
33 total receipts at the time of both the November 12 and December 31, 2014, contributions.<sup>13</sup>  
34

<sup>8</sup> See FGCR at 5-6, n. 24; The Fund Supp. Resp. at 2.

<sup>9</sup> The Fund Supp. Resp. at 2.

<sup>10</sup> FGCR at 8, citing Advisory Op. 2006-04 (Tancredo) at 3; 11 C.F.R. § 300.2(c)(2)(vii).

<sup>11</sup> FGCR at 9.

<sup>12</sup> See AO 2006-04 at 3.

<sup>13</sup> FGCR at 10.

Moreover, the context of the overall relationship between Vitter and The Fund provides further evidence that The Fund was established, financed, maintained, or controlled by Vitter. The Fund has acknowledged that it was formed to support Vitter.<sup>14</sup> Further, of the approximately \$7.4 million dollars the Fund spent in its lifetime, there is no indication that it solicited any contributions or made any expenditures to further the election of any other candidate.<sup>15</sup> In addition, Vitter was involved in The Fund's fundraising efforts, which were focused exclusively on raising funds to help get Vitter elected to office in Louisiana. Most notably, Vitter was featured on the invitation for The Fund's Louisiana Bayou Weekend fundraiser as a "special guest" (no other candidate is pictured or mentioned on the flyer), and Vitter attended the fundraiser. In addition, Vitter is the face of The Fund's website — his photograph and statements are prominently and exclusively featured on the website, including on its donation page. Finally, The Fund uses the same fundraising consultants (Lisa Spies and Guastella) as the Vitter Committee, an overlap which may indicate a "formal or ongoing relationship" of the sort that the Commission's regulation suggests may serve as evidence of a covered relationship under section 30125(e) to conclude that the Committee "established, financed, maintained, or controlled the Fund."<sup>16</sup> All of these facts reflect a relationship between the Vitter Committee and the Fund that support a finding that Vitter may have established, financed, maintained, or controlled The Fund, and Respondents present no compelling response to refute this conclusion.

**B. OGC's Use of the Funding Information Contained in Disclosure Reports Filed with the Commission is Permissible under the Act and Commission Regulations and Complies with Enforcement Precedent**

According to the Supplemental Response, there are two procedures for the Commission to consider information prior to making a reason-to-believe finding, either based on a sworn complaint or information ascertained in the normal course of exercising its supervisory responsibilities.<sup>17</sup> Respondents argue that OGC is "impermissibly stepping into the shoes of the Complainant, resulting in additional speculative and unsworn claims" and "injecting facts into a complaint-generated matter—in this case contributions that occurred after the complaint and response were filed."<sup>18</sup> Respondents further argue that this "post-hoc injection of facts in this case runs counter" to the Act and cannot be justified as "supervisory responsibilities" because "supervisory responsibilities" do not involve "roving statutory functions" and cannot be used to "gather and compile information and to conduct periodic investigations."<sup>19</sup> Last, Respondents argue that mere curiosity is not a basis for FEC investigations.<sup>20</sup>

<sup>14</sup> See *id.* at nn.10, 11, 28 and accompanying text.

<sup>15</sup> FGCR at 10, n.42.

<sup>16</sup> FGCR at 10-12.

<sup>17</sup> The Fund Supp. Resp. at 3.

<sup>18</sup> *Id.* at 4.

<sup>19</sup> *Id.* at 3 citing *FEC v. Machinists Non Partisan Political League*, 655 F.2d 380, 387 (D.C. Cir. 1981).

<sup>20</sup> *Id.* citing *FEC v. Machinists Non Partisan Political League*, 655 F.2d at 388.

1 Contrary to the Respondents' arguments, OGC's use of the funding information  
2 contained in disclosure reports filed by Respondents with the Commission is permissible and  
3 appropriate. The Complaint alleges that Vitter, his Committee, and agents violated 52 U.S.C.  
4 § 30125(e), by soliciting non-federal funds for The Fund. That allegation in the Complaint  
5 provides sufficient nexus, and notification to the Respondents, for OGC to examine the  
6 relationship between Vitter and The Fund in the context of section 30125(e), which provides the  
7 "established, financed, maintained, or controlled" standard for entities related to federal  
8 candidates and officeholders. Moreover, the first contribution made by the Vitter Committee to  
9 The Fund in the amount of \$100,000 occurred on February 14, 2014, which was one month prior  
10 to the filing of the Complaint.

11  
12 The funding information contained in Respondent's disclosure reports is publicly  
13 available and is relevant information ascertained in the normal course of carrying out the  
14 Commission's supervisory responsibilities. Court precedent has not only allowed, but has  
15 compelled the Commission to use this type of information in making its reason-to-believe  
16 determinations. For example, in *In re FECA Litigation*, 474 F. Supp. 1044 (D.D.C. 1979), the  
17 court ruled that the Commission must take into consideration all available information when  
18 making a finding. The court explained:

19  
20 ...the Commission may not rely solely on the facts presented by the sworn  
21 complaint when deciding whether to investigate. Although the facts provided in  
22 a sworn complaint may be insufficient, when coupled with other information  
23 available to the Commission—gathered either through similar sworn complaints  
24 or through its own work—the facts may merit a complete investigation. By the  
25 same turn, a persuasive and strong complaint may not merit an investigation  
26 because the Commission possesses reliable evidence indicating that no violation  
27 has occurred. Thus, it is clear that a consideration of all available material is  
28 vital to a rational review of Commission decisions.<sup>21</sup>

29  
30 And, in *Antosh v. FEC*, 599 F. Supp. 850 (D.D.C. 1984), the court overturned the Commission's  
31 dismissal of a complaint for failure to consider a previously filed publicly available report.<sup>22</sup>

32 Enforcement precedent also supports using facts contained in disclosure reports filed  
33 post-complaint or facts occurring post-complaint, when making a determination of whether there  
34 is reason to believe the Act has been violated. In MUR 5367 (Issa), which also dealt with soft  
35 money allegations, the Complaint mentions only \$445,000 of contributions from Issa, or his  
36 corporation, to a state ballot measure committee, Rescue California. The FGCR, however, refers  
37 to approximately \$1.2 million of additional financing that occurred post-complaint, and that  
38 additional amount was material to the recommendations. Based on the recommendations, the  
39 Commission found reason to believe that Issa established, financed, maintained or controlled

<sup>21</sup> *In re Federal Election Campaign Act Litigation*, 474 F. Supp. at 1046.

<sup>22</sup> Citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971) (the agency's decision must be "based on a consideration of the relevant factors").

1 Rescue California, and that Rescue California violated the Act by receiving and spending non-  
2 federal funds.<sup>23</sup> In MUR 6848 (Demos), the Complaint alleged that \$2 million in candidate loans  
3 to the committee were not from personal funds. The FGCR includes two additional loans  
4 totaling \$500,000 the candidate made after the complaint was filed, and the Commission's  
5 reason-to-believe findings addressed the entire amount.<sup>24</sup>

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7 Based upon the foregoing, the Commission's use of the information contained in  
8 Respondent's disclosure reports is permissible in making a reason-to-believe finding as it is  
9 relevant and material to the allegations of the Complaint.

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11 **C. Respondents' Challenge to the Constitutionality of the Application of the**  
12 **"Financing" Analysis Contained in 52 U.S.C. § 30125(e) is Meritless**

13  
14 According to Respondents, the Vitter Committee has a First Amendment right to  
15 contribute to The Fund, and the Vitter Committee's constitutional right to make a contribution is  
16 not "transformed" into a soft money violation.<sup>25</sup> In support of this argument, Respondents cite  
17 *Citizens United* and argue that the identity of the speaker, in this matter a political committee,  
18 does not determine whether its speech is protected.<sup>26</sup> According to Respondents, the government  
19 can restrict contributions to candidates because of the risk of *quid pro quo* corruption,<sup>27</sup> but  
20 independent expenditures do not give rise to or present the appearance of corruption, and that  
21 with independent expenditures, the "candidate funding circuit" is broken and negates *quid pro*  
22 *quo* corruption.<sup>28</sup> Thus, Respondents argue that the government has no anti-corruption interest in  
23 limiting contributions to IEOPCs,<sup>29</sup> and the application of the "established, financed, maintained,  
24 or controlled" analysis in section 30125(e) cannot be used to restrict contributions to IEOPCs.

<sup>23</sup> Factual & Legal Analysis at 4, MUR 5367 (Issa) ("Because Rep. Issa provided Rescue California with seed money and needed capital throughout the ballot qualification period, and continued to fund the committee even after the recall measure qualified for the ballot, the available information indicates that he established, financed, and maintained Rescue California."); Certification, MUR 5367 (Feb. 3, 2004). Later, the Commission determined to take no further action and close the file as to respondents based on OGC's recommendation and analysis of a subsequent Advisory Opinion 2005-10 (Berman/Doolittle), that there was no federal office on the ballot and that the recall ballot measure was "not an election other than an election for federal office," and thus section 30125(e) would not restrict federal candidates and officeholders in their fundraising capacities for the ballot measure committee. See Second GCR at 2-3, MUR 5367; Certification MUR 5367 (Nov. 3, 2005).

<sup>24</sup> Factual & Legal Analysis at 3, n.10, MUR 6848 (Demos) (open matter).

<sup>25</sup> The Fund Supp. Resp. at 5. Respondents further argue that Courtney Guastella and Lisa Spies were free to solicit unlimited individual and corporate contributions as agents of The Fund. *Id.*

<sup>26</sup> *Id.* at 4-5, citing *Citizens United v. FEC*, 558 U.S. 310, 342 (2010).

<sup>27</sup> *Id.* at 4, citing *Buckley v. Valeo*, 424 U.S. 1, 26-27 (1976).

<sup>28</sup> *Id.* at 4, citing *Citizens United*, 558 U.S. at 357; *Arizona Free Enter. Club's Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2826-27 (2011).

<sup>29</sup> *Id.* at 4, citing *Texans for Free Enterprise v. Texas Ethics Commission*, 732 F.3d 535, 538, n.3 (quoting *SpeechNow.org v. FEC*, 599 F.3d 686, 694-95 (D.C. Cir. 2010).

1 Last, Respondents point to the permanent injunction issued by the Eastern District of Louisiana  
2 against the enforcement of the state statute limiting contributions to The Fund, as an IEOPC.<sup>30</sup>  
3

4 Section 30125(e)(1) prohibits federal candidates and officeholders, their agents, or “an  
5 entity directly or indirectly established, financed, maintained, or controlled” by or acting on  
6 behalf of a federal candidate or officeholder from, *inter alia*, soliciting, receiving, or spending  
7 non-federal funds.  
8

9 The Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003) upheld this statute as  
10 constitutional against the plaintiff’s First Amendment challenge:  
11

12 No party seriously questions the constitutionality of § 323(e)’s  
13 general ban on donations of soft money made directly to federal  
14 candidates and officeholders, their agents, or entities established  
15 or controlled by them. Even on the narrowest reading of  
16 *Buckley*, a regulation restricting donations to a federal candidate,  
17 regardless of the ends to which those funds are ultimately put,  
18 qualifies as a contribution limit subject to less rigorous scrutiny.  
19 Such donations have only marginal speech and associational  
20 value, but at the same time pose a substantial threat of corruption.  
21 By severing the most direct link between the soft-money donor  
22 and the federal candidate, § 323(e)’s ban on donations of soft money  
23 is closely drawn to prevent the corruption or the appearance of corruption  
24 of federal candidates and officeholders.<sup>31</sup>  
25

26 Thus, section 30125(e)(1) is a restriction on soft money donations made to federal  
27 candidates and officeholders — including their agents and entities established, financed,  
28 maintained or controlled by them — and not to IEOPC’s as the Supplement Response posits.  
29 Here, the fact that The Fund is registered as an IEOPC does not mean that 30125(e)(1) analysis is  
30 being applied as a means to restrict contributions to an IEOPC. To the contrary, if The Fund was

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<sup>30</sup> *Id.* at 4, citing *Fund For Louisiana’s Future v. Louisiana Bd. of Ethics*, 17 F. Supp.3d 562 (E.D. La. 2014) (“the State’s restrictions on uncoordinated, independent political speech cannot pass constitutional muster.” *Id.* at 570).

<sup>31</sup> *McConnell*, 540 U.S. at 182. The Court further discussed that the soft money ban on federal candidates and officeholders is justified as anti-circumvention measures:

Section 323(e)’s restrictions on solicitations are justified as valid anticircumvention measures. Large soft-money donations at a candidate’s or officeholder’s behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA’s contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. *Id.* at 182-183.

1 established, financed, maintained, or controlled by Vitter, it is not truly independent of Vitter,  
2 and not truly an IEPOC.<sup>32</sup>  
3

#### 4 IV. CONCLUSION

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6 The information above further supports the recommendations in the FGCR that the  
7 Commission find reason to believe The Fund for Louisiana's Future and Charles R. Spies in his  
8 official capacity, David Vitter for U.S. Senate and William Vanderbrook in his official capacity  
9 as treasurer, and David Vitter violated 52 U.S.C. § 30125(e), and to take no action at this time as to  
10 Lisa Spies and Courtney Guastella.

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<sup>32</sup> Nor do Respondents cite any court ruling that applying section 30125(e) in the manner that the FGCR does is unconstitutional. Absent a court ruling to the contrary, the Commission should continue to give the soft money donations ban in section 30125(e) full force and effect with regard to entities established, financed, maintained, or controlled by federal candidates or officeholders. In Advisory Opinion 2012-32 (Tea Party Leadership Fund) involving a constitutional challenge to the Act's contribution limits at section 30116(a)(1)(A) and the definition of a "multicandidate committee" at section 30116(a)(4), the Commission recognized that it lacked the power to make a determination that those provisions were unconstitutional because no court had invalidated them. Accordingly, the Commission stated that it was "required to give these provisions full force." *Id.* at 3.

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